SUPREME COURT, U. S.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

NO. 73-1932

WILLIAM GROSER,
d/b/a/ LUCKY DISTRIBUTORS,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE FIFTH CIRCUIT

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v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE FIFTH CIRCUIT

The Petitioner, respectfully prays that a Writ of Certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above case on May 24, 1974.

OPINION BELOW

The Opinion of the Court of Appeals is unreported as of this writing, but is appended hereto as Appendix A.

JURISDICTION

The Judgment of the Court of Appeals for the Fifth Circuit was entered on May 24, 1974 (Appendix A). This Petition for Writ of Certiorari is being presented within thirty (30) days. This Court's jurisdiction is invoked under *Title 28 U.S.C. 1254 (1).*

QUESTIONS PRESENTED

1. Is there a compelling reason to grant certiorari because of the substantial conflict between the circuits in the application of Miller Standards to pre-Miller conduct?

2. Whether the provisions of Title 18 United States Code, § 1462 on its face and as construed and applied to authorize the judgments of conviction of Petitioner herein, were, prior to June 21, 1973, unconstitutionally vague, violating the First and Fifth Amendments, because:

(a) The statute concededly does not contain a description of the specific sexual conduct *Miller v. California,* 413 U.S. 15, held was constitutionally mandated, and prior to June 21, 1973, the statute had not received an authoritative construction reading the necessary terminology into the statute;

(b) Prior to June 21, 1973, the statute was authoritatively construed as requiring proof that charged publications and films offend national standards, which nationwide standards this Court held were unascertainable, unprovable and non-existent;

(c) Prior to June 21, 1973, the statute was authoritatively construed as requiring proof that charged publications and films appeal to the prurient interest of the average person in the Nation as a whole, which test this Court labelled "unrealistic";

(d) Prior to June 21, 1973, the statute had been authoritatively construed as requiring proof that charged publications and films were "utterly without redeeming social value," a test this Court found "unworkable" and "ambiguous";

(e) Prior to June 21, 1973, the statute was so "vague, ambiguous and essentially meaningless" that this Court was compelled to act as an unreviewable board of censorship "subjectively judging each piece of material" charged with being obscene under § 1462.

3. Whether the Indictment herein in statutory language are fatally defective because they fail to inform Petitioner of the nature and cause of the accusations against him, in violation of the applicable provisions of the Sixth Amendment.

4. Whether the provisions of Title 18 United States Code, §§ 1462, on their face and as construed and applied to authorize the judgments of conviction of Petitioner herein, under a standard for judging *scienter* solely by alleged proof of a general knowledge of the nature of the materials involved, and without competent evidence to establish even that Petitioner had such knowledge, abridge the freedoms of speech and press and arbitrarily deprive Petitioner of his liberty and property without due process of law, in violation of the First and Fifth Amendments.

1

5. Whether the provisions of Title 18 United States Code, § 1462, on their face and as construed and applied to authorize the judgments of conviction of Petitioner herein where the Indictment, trial and convictions of Petitioner were concededly governed only by the standards for judging obscenity enunciated in *Memoirs v. Massachusetts*, 383 U.S. 413, and where the Government presented no evidence that the publications and film exceeded national community standards or were utterly without redeeming social value, and where the undisputed record established that the materials did not exceed national community standards and had educational and other social value, violate the free speech and press and due process provisions of the First and Fifth Amendments.

6. Whether the provisions of Title 18 United States Code, § 1462, on their face and as construed and applied to authorize the judgments of conviction of Petitioner herein, where the publications named in the Indictment are not obscene and are entitled to constitutional protection as a matter of law, violate the free speech and press and due process provisions of the First and Fifth Amendments.

7. Whether the provisions of Title 18 United States Code, § 1462, on their face and as construed and applied to authorize the judgments of conviction of Petitioner herein, where the publications, although constitutionally protected in fact and in law under the *Memoirs* test, were nevertheless held obscene under both the *Memoirs and Miller* tests by the Court of Appeals, abridge the exercise of freedoms of speech and press, arbitrarily deprive Petitioner of his liberty without due process of law and constitute an *ex post facto* and retroactive unforeseen judicial construction of the provisions of the statute, all in violation of the guarantees of the First and Fifth Amendments and Article I, § 9.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the First, Fifth, Sixth and Eighth Amendments, and Article I, § 9 of the Constitution, and the pertinent provisions of 18 U.S.C. § 1462, appear in Appendix "B" hereto.

STATEMENT

1. On April 7, 1970 the Petitioner was charged in a two (2) count indictment filed in the Northern District of Texas for violation of *Title 18 U.S.C. 1462* (Interstate Transportation of Obscene Matter, U12-A-U12, Common Carrier).

The Verdict of the Jury was rendered on December 4, 1970, and on December 28, 1970 sentence was imposed of five (5) years on each count to run concurrent and a Five Thousand Dollar ($5,000.00) fine.

Although numerous books were involved in the two-count indictment, it was stipulated that each count of the indictment would be reduced to two (2) books per count *(R.A. 234, 235)*.

2. Following the return of the indictment, the petitioner filed pretrial motions. The Motion to Dismiss the indictment alleged that the indictment, and each and every count thereof – in essence failed to state facts sufficient to constitute an offense against the United States; failed to allege the essential elements of "obscenity" and the essential elements of guilty knowledge and specific intent; and, in addition, that *18 U.S.C. § 1462*, on its face and as construed and applied,

violated the free speech and press, due process and equal protection provisions of the *First, Fifth and Sixth Amendments* and other pertinent constitutional provisions. Petitioner also moved the Court to dismiss the indictment upon the ground that the publications referred to in each and every count of the indictment were not obscene and were constitutionally protected, and requested an evidentiary hearing in connection with the motion, offering to produce oral testimony and to file with the Court materials comparable to the publications which had been adjudicated as being protected by the free speech and press provisions of the *First Amendment.*

During the trial, Petitioner continued to raise his constitutional defenses by a *Motion for Judgment of Acquittal.* At both the conclusion of the government's case and at the conclusion of all the evidence the Motions were denied without formal ruling.

At the trial the government did nothing more than introduce the materials into evidence for the juror's perusal as its method of carrying it's Burden of Proof thereby attempting to establish a "Res ipsa loquitur – negligence". Standard for deciding the obscenity of the materials in a criminal case as a sufficient means of satisfying the government's Burden of Proof that the materials in question are *obscene* "beyond reasonable doubt".

3. On or about January 11, 1972, the initial panel majority opinion, 475 F.2d. 550 authored by Circuit Judge Thornberry, reversed the conviction of Mr. Groner, and stated in part as follows:

"Groner alleges numerous errors in the district court's judgment. We find it necessary to discuss only two of these allegations and to render a decision on only one."

a. The majority opinion of the initial *Groner* panel established the *Roth-Memoirs* standards as the test to be applied.

b. That expert testimony was necessary on the part of the prosecution to establish "what constitutes the community standard of decency ... We think evidence of the material's prurient appeal is necessary."

c. The Court further held, at least by dicta, that the national standards were the limits of candor to be applied.

Circuit Judge Clarke concurred with the ruling of the majority because he felt bound to by "mutable precedents", but added, "I would unhesitantly abandon the 'national standard' concept."

4. A timely petition was filed for rehearing, as well as a petition for rehearing en banc, and on March 28, 1972, the Court ordered the rehearing en banc be submitted on briefs without argument.

5. On May 22, 1973, the *en banc* decisions (479 F.2d. 577) were rendered by the Court, which held essentially as follows:

a. The decision of the seven (7) Circuit Judges in an opinion authored by Judge Gewin reviewed the six (6) contentions asserted by Groner and held as follows:

(1) No expert testimony is necessary by the prosecution.

(2) That the test set forth by the original panel utilizing the so-called tri-partite *Roth* standards was incorrect and "is not the prevailing test, although it was the test used by the trial court and by the panel at the suggestion of counsel for the parties" and set forth the only test that the split *en banc* panel opinion, authored by Judge Gewin, would permit, quoting from *Kois v. Wisconsin*, 408 U.S. 229, as follows: "Material may be considered obscene when 'to the average person applying contemporary community standards, the dominant theme of the material taken as a whole appeals to the prurient interest'."

(3) The Court held "for the trial of obscenity cases under federal law 'a community' should logically embrace that area from which the jury is drawn and selected."

(4) The material is obscene as a matter of law by virtue of the independent constitutional judgment of the author of the *en banc* decision and those who concurred.

(5) As to the other contentions of Groner, the Court stated "there is no merit in any of them."

Among the contentions found to be without merit by the Court, but not discussed in its opinion, were: (i) *18 U.S.C.* § *1462* is unconstitutional on its face; (ii) the books in question were unlawfully seized and should have been suppressed; (iii) the trial court improperly limited jury argument.

B. In the concurring opinion authored by Judge Ainsworth, he found specially as follows:

(1) The *Roth* test is the only test to be applied and thus joins with the Gewin panel.

(2) The material is obscene under the evidence presented.

(3) Expert witness testimony is not necessary.

Judge Ainsworth did not discuss any of the other contentions raised by Appellant.

C. Circuit Judge Clark, concurring, specially stated:

(1) "I do, however, adhere to my view that Judge Thornberry correctly distilled the essence of *Roth* in the three part test which he originally enunciated and that this test is still viable."

(2) "The judge . . .instructed the jury to apply a nationwide standard . . . Since the jury was instructed on the more inclusive standard, the verdict would still be secure if it turns out that the narrower, local community standard should have been applied."

Judge Clark did not render an opinion as to whether he felt a national or local standard must constitutionally be applied.

(3) Applying the national standard test, Judge Clark found the material to be obscene under the tripartite test originally set forth in the initial panel's opinion.

Judge Clark expressed no opinion as to the other issues raised by the Petitioner.

D. The dissenting opinion of Circuit Judge Thornberry, with whom Judges Brown, Wisdom, Goldberg, Godbolt, Simpson and Morgan joined, held in essence as follows:

(1) The test to be applied is the three-pronged test for obscenity which is part of the initial panel's formulation and which was rejected by the opinion authorized by Judge Gewin on rehearing.

(2) That expert witness testimony is required on the part of the Government in arguing the "redeeming social value element" of the obscenity test.

(3) That debate between national and local standards will remain academic until the Supreme Court decides the several cases argued before it, including *Kaplan v. California*, No. 71-1422.

(4) The Thornberry panel indicated no fuling on the other contentions raised by appellant.

6. Petitioner William Groner, by his attorneys, filed a timely petition in the United States Supreme Court docketed as No. 72-1731 in June, 1973 at a time prior to the decisions of that Court on June 21 and 25, 1973 of the so-called "obscenity-pornography" cases.

The five (5) questions presented for review by that petition were as follows:

"I. Whether the Government's failure to introduce affirmative expert testimony establishing that the books in question satisfied constitutional standards for a determination of obscenity requires reversal of

the Petitioner's conviction under the First and Fifth Amendments.

II. Whether the Government's failure to introduce affirmative evidence that the Petitioner knew or had reason to know of the allegedly obscene character of the books in question requires reversal of the Petitioner's conviction under the First and Fifth Amendments.

"III. Whether 18 U.S.C. § 1462 is unconstitutional on its face and as applied and violative of the Petitioner's rights under the First and Fifth Amendments.

"IV. Whether, when subjected to a comparative appraisal in conjunction with publications previously held by this Court not to be obscene, the books in question are not obscene as a matter of law.

"V. Whether the en banc Court of Appeals, in affirming the Petitioner's conviction, erroneously formulated and applied the relevant constitutional standards for a determination of obscenity."

7. This Court vacated and remanded back this case to Fifth Circuit in the following language.

"October 23, 1973. On petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit. Petitions for writs of certiorari granted, judgments vacated, and cases remanded to the respective courts for further consideration in light of Miller v. California, 413 U.S. 15, 37 L.Ed. 2d 419, 93 S.Ct. 2607 (1973); Paris Adult Theatre I v. Slaton, 413 U.S. 49, 37 L.Ed. 2d 446, 93 S.Ct. 2628 (1973); Kaplan v. California, 413 U.S. 115, 37 L.Ed. 2d 492,

93 S.Ct. 2680 (1973); United States v. 12 200-ft. Reels of Super 8mm. Film, 413 U.S. 123, 37 L.Ed. 2d 500, 93 S.Ct. 2665 (1973); United States v. Orito, 413 U.S. 139, 37 L.Ed. 2d 513, 93 S.Ct. 2674 (1973); Heller v. New York, 413 U.S. 483, 37 L.Ed. 2d 745, 93 S.Ct. 2789 (1973); Roaden v. Kentucky, 413 U.S. 496, 37 L.Ed. 2d 757, 93 S.Ct. 2796 (1973); and Alexander v. Virginia, 413 U.S. ———, 37 L.Ed. 2d 993, 93 S.Ct. 2803 (1973)."

8. The Circuit Court invited briefs of counsel, and after reviewing the same, placed the case on the summary calendar. (CA-5 Local Rule 18). The Court thereupon affirmed the judgment below.

The Court of Appeals held that the provisions of 18 U.S.C. 1462, were not void for vagueness or overbreath, relying on the opinions of the various panels of the Circuit beginning with *U.S. v. Thevis,* 484 F. 2d 1149, and including *United States v. Millican,* 487 F. 2d 331; *United States v. Cote,* 485 F. 2d 574; *United States v. New Orleans Book Mart, Inc.* 490 F. 2d 73; *United States v. Sulaiman,* 490 F.2d 78; and *United States v. Thevis,* 490 F. 2d 76.

The Court concluded that 18 U.S.C. 1462 had been the subject of an authoritative judicial construction which rendered its application constitutionally proper. They held that knowledge of the alleged character of the publications in interstate commerce was sufficient for scienter.

REASONS FOR GRANTING THE WRIT

1. The judgment against the Petitioner herein is in direct conflict with cases decised in the Ninth, Tenth and First Circuits. *United States v. Henson,* unreported, (9 Cir., No. 73-2063, October 5, 1973),[1] *United States v. Friedman,* 488 F.2d 1141 (10 Cir. 1974); *United States v. Palladino,* 490 F.2d 499 (1 Cir. 1974). In *Henson, as in the case at bar, a* judgment of conviction was rendered by utilizing the *Roth-Memoirs* test. In vacating the judgment of conviction, the Court said:

> "In instructing the jury in respect to the question of obscenity, the trial judge generally and properly enunciated the tests as they were to be found in controlling Supreme Court authorities existing at the time, principally, *Roth v. United States,* 354 U.S. 476 (1957), and *Memoirs v. Massachusetts,* 383 U.S. 413 (1966). Thereafter, on June 21, 1973, and after the entry of the judgments of conviction here challenged, the Supreme Court issued a series of opinions in which its prior definitions of obscenity were in part repudiated and in which some elements of the previously existing tests applied by the District Court in this case were generally characterized as vague, ambiguous, or essentially meaningless." (Emphasis added).

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[1] The Government, in seeking rehearing, with a suggestion for a rehearing *en banc,* stated: "The opinion of the panel . . . must be read as holding that the obscenity test used at trial was repudiated by the Supreme Court in *Miller v. California* as unconstitutionally vague." (Govt. Pet. for Rehearing in *Henson,* 11). On December 3, 1973, the Court made an order in *Henson,* deferring action on the Government's petition for rehearing with suggestion for rehearing *en banc,* "pending the court's disposition of a number of cases now pending before the full court en banc, the disposition of which may affect the court's opinion in the subject case."

After vacating the judgment of conviction, the Court remanded the case to the District Court for reconsideration in light of this Court's decisions of June 21, 1973, and in light of *Stroud v. State*, 300 N.E.2d 100 (August 21, 1973), and *Mohney v. State*, 300 N.E.2d 66 (August 21, 1973), wherein the Indiana Supreme Court declared that State's obscenity statute unconstitutionally vague in light of this Court's June 21, 1973 decisions.

In *United States v. Friedman, supra*, the court vacated an obscenity conviction and remanded to the District Court for a new trial. The Court stated that it was its view

> "that the several recent [obscenity] decisions of the Supreme Court require a reconsideration of the standards applicable to cases of this nature.... These decisions... require a re-examination of the facts of this case together with the determination of what may be the applicable standards... A consideration of the application of national or local standards should be initially made by the trial court in addition to the determination of what such standards may be." (488 F.2d at 1141-1142).

In *United States v. Palladino*, 490 F.2d 499 (1 Cir. 1974), the Court reversed a federal obscenity conviction which occurred prior to June 21, 1973. The Court stated that the "defendants are caught in a period of transition, their prosecutions having taken place before the Miller decisions. They cannot fairly be subjected to penalties for violation of rules established after their actions." (490 F.2d at 500).

2. In light of *Miller v. California*, 413 U.S. 15, and the related cases, the federal criminal statute involved herein,

affecting First Amendment rights, was prior to June 21, 1973, unconstitutionally vague for the following five reasons:

(a) the statute concededly does not contain a description of the specific sexual conduct *Miller* held was constitutionally mandated, and prior to June 21, 1973, the statute had not received an authoritative construction reading the necessary terminology into the statute;

(b) prior to June 21, 1973, the statute was authoritatively construed as requiring proof that charged publications offend national standards, which nationwide standards this Court found were unascertainable, unprovable and non-existent

(c) prior to June 21, 1973, the statute was authoritatively construed as requiring proof that charged publications appeal to the prurient interest of the average person in the Nation as a whole which test this Court labeled "unrealistic";

(d) prior to June 21, 1973, the statute had been authoritatively construed as requiring proof that charged publications were "utterly without redeeming social value," a test this Court found "unworkable" and "ambiguous";

(e) prior to June 21, 1973, the statute was so "vague, ambiguous and essentially meaningless" that the Court was compelled to act as an Unreviewable Board of censorship "subjectively judging each piece of material" charged with being obscene under § 1462.

Some aspects of the constitutional issue here involved were briefed and argued before this Court in *Hamling, et al v. United States,* October Term, 1973, No. 73-507.

In brief, 18 U.S.C. § 1462 is not on its face limited to any specifically defined sexual conduct. The trial court's instructions to the jury defining "obscenity" were restricted to the three-part *Memoirs* test. Neither the statute on its face nor as construed and applied by the court's instructions was confined to specifically defined depictions or representations of sexual conduct. At no time prior to 1970, had this Court or any other federal court had occasion to authoritatively construe the federal obscenity statute to limit its reach to specifically defined sexual conduct, and in *United States v. 12 200-Ft. Reels of Film,* 413 U.S. 123, n. 7., this Court only stated that it was "prepared" to construe the vague terms "obscene, lewd, lascivious, filthy," in accordance with *Miller.* The court below has acted on the assumption that "the definition of Miller is a gloss properly added to [§ 1462]." *United States v. Thevis,* 484 F.2d 1149, 1155. Such a ruling which reads provisions into a law which were not present at the time the offense allegedly was committed, or when the indictment was returned or when the case was tried, constitutes a sheer deprivation of liberty without due process of law (*Rabe v. Washington,* 405 U.S. 313; *Cole v. Arkansas,* 333 U.S. 196; *DeJonge v. Oregon,* 299 U.S. 353), an act of judicial legislation (*United States v. Robel,* 389 U.S. 258), and a retroactive judicial construction barred by the *ex post facto* and due process provisions of the United States Constitution.

The jury in the case herein was required to measure the alleged obscenity of the publications and film by "national

community standards," a national standard which this Court has termed "hypothetical," "unascertainable," "abstract," "unrealistic" and "an exercise in futility." Standards which *are hypothetical, abstract and unascertainable are precisely the* standards which this Court has uniformly condemned as violative of the free speech and due process provisions of the Constitution. These are the kind of standards that may trap the innocent by not providing fair warning, and the kind of standards which sweep within their ambit speech and press ordinarily entitled to constitutional protection. These are also the standards which permit arbitrary and discriminatory enforcement, and which delegate basic societal policy matters to police officers, judges and juries for resolution on an *ad hoc* and subjective basis. See, *Grayned v. City of Rockford,* 408 U.S. 104, 108-109; *Smith v. Goguen,* 94 S.Ct. 1242; *Lewis v. New Orleans,* 94 S.Ct. 970; *Plummer v. City of Columbus,* 94 S.Ct. 17; *Gooding v. Wilson,* 405 U.S. 518; *Papachristou v. City of Jacksonville,* 405 U.S. 156.

The Court of Appeals below has not controverted the allegation made by Petitioner that the "national community standard" under which the judgments of conviction herein were rendered is an obviously vague, ambiguous, uncertain and overbroad standard in the light of the decisions of this Court on June 21, 1973. The court is content to simply uphold the judgments of conviction in the light of the newly enunciated standards. It is obviously plain that such a "local community standard" was not in existence during the entire trial proceedings and was never given to the jury in the case herein. There is, here again, it is submitted, the same failure of due process notice, the same type of retroactive judicial construction and legislation.

With respect to the element of social value and importance, this Court unanimously agreed that the concepts of "social value" and "importance" are constitutionally ambiguous and "unworkable" and, indeed, virtually without any meaning at all. Thus, the jury was permitted, under the federal obscenity statute as construed and applied by the trial court, to exercise their individual whims and prejudices as to what each of the jurors deemed socially desirable.

Finally, in this connection, Petitioners urge again that the vagueness, ambiguity and unworkability of the standards for judging obscenity are exemplified by the candid expression of this Court that under the *Roth-Memoirs* test, the Court "was compelled to embark on the practice of summarily reversing convictions for the dissemination of materials that at least five members of the Court, applying their separate tests, found to be protected by the First Amendment . . . the *Redrup* procedure has cast us in the role of an unreviewable board of censorship for the 50 States subjectively judging each piece of material brought before us." 413 U.S. at 22.

Where Justices of the Supreme Court are compelled to "subjectively" judge each publication brought before them because of the vagueness and unworkability of the standards which the Court itself had enunciated, and which has led to divergent and contradictory views by members of the Court, it appears constitutionally impermissible to uphold a judgment of conviction which has been rendered under such incomprehensive criteria.

3. In light of this Court's decisions of June 21, 1973, the Indictments herein are fatally defective, because they fail to inform Petitioner of the nature and cause of the accusations

against him, in violation of the Sixth Amendment.

In *United States v. Orito*, 93 S.Ct. 2674, 2679, this Court vacated the judgment of the District Court and remanded the case "for reconsideration of the *sufficiency of the indictment* in light of *Miller v. California, supra; United States v. Twelve 200-Ft. Reels, supra,* and this opinion." (Emphasis added).

In the decisions of June 21, 1973, the Court was unanimous on one point, and one point only– that the *Roth Memoirs* test had failed to give adequate guidance as to what publications were criminal and what publications were unconditionally protected by the free speech and press provisions of the First Amendment. The *Roth-Memoirs* test was rejected as unworkable and unsupported by any member of the Court. The confusion surrounding this "legal term of art" was explored by the Fifth Circuit in the cancior decision of the Circuit Court in this case, both by the panel (475 F.2d 550 15 Cir. 1971) and by the court en banc (479 F.2d 577 15 Cir. 1973]). Judge Clark commented on the Court's failure to give "the respective limits of 'free press' rights under the First Amendment and unprotected publications which exploit sexuality," stating that "the judiciary has created a quagmire" (475 F.2d at 559). Judge Gewin, speaking for the majority of the en banc court, stated that the familiar *Roth-Memoirs* test "represents an amalgam of the individual views of members and former members of the Supreme Court, taken from their respective concurring or dissenting opinions in *Roth* and subsequent decisions involving obscenity." (479 F.2d at 580). He concluded that the *Roth-Memoirs* test "is not the prevailing test" (479 F.2d at 580). In overruling the panel's decision in *Groner*, Judge Gewin stated: "[I]t is apparent that the panel opinion was decided on an erroneous view of the test to be applied in determining obscenity. Neither the 'patent offensive' nor the 'utterly without redeeming social value' elements are included in the test laid down by the Supreme Court, nor is the community national in scope." (479 F.2d at 583). Judge Ainsworth (joined by Judges Gewin, Bell, Coleman, Dyer, Clark, Ingraham and Ronney) recognized that "accurate guidelines . . . based on past decisions of the Supreme Court, are hard to find." (479 F.2d at 586).

Moreover, in the Fifth Circuit's decision in *United States v. Thevis*, 484 F.2d 1149, the Court recognized that the statutory terminology "obscene, lewd, lascivious and filthy" "does not contain the specifics required by *Miller*," and that "*Miller* requires that elements of the definition be a part of the statute" (484 F.2d at 1155). Nevertheless, the Fifth Circuit concluded that the statutory deficiences "can be satisfied by a judicial gloss," (484 F.2d at 1154, 1155) and that this subsequently imposed judicial gloss could appropriately be read into indictments retroactively. Yet, in the light of *Miller*, it cannot be said that the words "obscene, lewd, lascivious, indecent, filthy and vile," standing by themselves in an indictment, afford the requisite "fair notice" and "concrete guidelines" required by the Constitution.

Russell v. United States, 369 U.S. 749, is the leading case dealing with the sufficiency of an indictment in a federal prosecution. *Russell* holds that in an indictment upon a statute, *it is not sufficient to set forth the offense in the words of the statute*, unless those words of themselves fully, directly and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offense intended to be punished. (369 U.S. at 765-766). See also, *United States v. Carll*, 105 U.S. 611, 612. In light of the tortured and unsuccessful efforts of this Court and other courts to define "obscene, lewd, lascivious and filthy," it must be conceded by all that those words, standing alone, fail to set forth "all the elements necessary to constitute the offense" intended to be punished by §1465.

Where, as here, guilt or innocence depends so crucially upon the meaning given to the words "obscene, lewd,

lascivious or filthy," the Indictments must do more than simply repeat the vague language of that criminal statute. "It is an elementary principle of criminal pleading, that where the definition of an offense, whether it be at common law or by statute, includes generic terms, it is not sufficient that the indictment shall charge the offense in the same generic terms as in the definition, but it must state the species – it must descend to particulars. . . . An indictment not framed to apprise the defendant with reasonable certainty of the nature of the accusation made against him . . . is defective, although it may follow the language of the statute". (369 U.S. at 765). The Court noted that "these basic principles of fundamental fairness retain their full vitality under modern concepts of pleading, and specifically under Rule 7(c) of the Federal Rules of Criminal Procedure . . . " (369 U.S. at 765-766). Where, as in the case at bar, the statutory language does not encompass all the elements of the offense, an indictment which merely repeats the statutory language requires the accused "to go to trial with the chief issue undefined. It enables his conviction to rest on one point and the affirmance of his conviction to rest on another. It gives the prosecution free hand on appeal to fill in the gaps of proof by surmise or conjecture. The Court has had occasion . . . to condemn such a practice in a quite different factual setting. Cole v. Arkansas, 333 U.S. 196, 201 212." (369 U.S. at 766). This principle has special application to obscenity prosecutions, where uncertainty as to the meaning of the term "obscene" has characteristically infected criminal proceedings under Section 1465. In the case at bar, we have no clarifying bill of particulars. In any event, *Russell* teaches us that a bill of particulars cannot save an invalid indictment. See, 369 U.S. at 770.

The central fact that emerges from the June 21, 1973 decisions is that the statutory language of Section 1462, and the gloss put on that language by *Roth-Memoirs*, failed to give Petitioner the constitutionally required notice. The Indictments, which merely repeated the defective statutory language were, therefore, fatally infirm. See, *United States v. Vuitch*, 402 U.S. 62; *Rabe v. Washington*, 405 U.S. 313; *Cole v. Arkansas*, 333 U.S. 196; *DeJone v. Oregon*, 299 U.S. 353. See also, *Smith v. Goguen*, 94 S.Ct. 1242; *Gooding v. Wilson*, 405 U.S. 518; *Papachristou v. City of Jacksonville*, 405 U.S. 156.

4. The Court of Appeals held that the standard for judging *scienter* m in a federal obscenity prosecution is merely "a general knowledge of the nature of the materials. Whether such standard satisfied constitutional requirements presents, it is submitted, a substantial question. Petitioner contends that, at a bare minimum, the Constitution requires proof of knowledge of the contents of the challenged materials. In any event, no competent evidence was adduced even to prove Petitioner's knowledge under the standard adopted by the Court of Appeals.

A. It should be noted initially, as heretofore indicated, that the Indictments charged only that the Petitioner acted "knowingly." A motion to dismiss the Indictments which raised the *scienter* issue was denied. Motions for judgment of acquittal, which again raised the question of the sufficiency of the proof of *scienter*, were also denied.

B. In *Roth v. United States,* 354 U.S. 476, the Court emphasized that the ambiguities of the standards for judging obscenity could not be reconciled with the due process guarantees of fair notice without proof of guilty knowledge and specific intent. See, cases cited in *Roth,* 354 U.S. at 491-492, and repeated in *Miller v. California,* 93 S.Ct. at 2617, n. 10.

In *Smith v. California,* 361 U.S. 147, the Court held that it was constitutionally impermissible to dispense entirely with the element of *Scienter,* in an obscenity prosecution. Justice Brennan, writing for the Court, stated:

> "We need not and most definitely do not pass today on what sort of mental element is requisite to a constitutionally permissible prosecution of a bookseller for carrying an obscene book in stock; whether honest mistake as to whether its contents in fact constituted obscenity need be an excuse; whether there might be circumstances under which the State constitutionally might require that a bookseller investigate further, or might put on him the burden of explaining why he did not, and what such circumstances might be." (361 U.S. at 154).[2]

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[2]Justice Black agreed that the ordinance could not penalize a bookseller, even though he was not aware of its

In *Mishkin v. New York,* 383 U.S. 502, the Court approved a construction of the state obscenity statute which required proof that the accused was in some manner aware of the "character" of the material, together with proof of "calculated purveyance" of the alleged obscene material (383 U.S. at 510). At the same time, the Court rejected a standard which would require mere proof of "knowledge of the contents of the books" (383 U.S. at 510, fn.9). Again, the Court reiterated that it was not yet prepared to define what sort of mental element was requisite to a constitutionally permissible obscenity prosecution (383 U.S. at 511), but the Court emphasized that the Constitution requires proof of *scienter* to avoid the hazard of self-censorship of constitutionally protected material and to compensate for "the ambiguities inherent in the definitions of obscenity." (383 U.S. at 511).

In *Redrup v. New York* and *Austin v. Kentucky,* 383 U.S. 767, certiorari was granted in both cases, limited solely to those questions which presented the issue of *scienter* in the petitions. In the *Per curiam* decision which followed, however, the Court decided that the material involved in the cases was not "obscene," the decision being made " without prejudice

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(Footnote 2 Continued)

"obscenity" (361 U.S. at 156). Justice Frankfurter understood the Court's opinion as holding that one could not be accused of violating the obscenity law unless he was charged with "knowledge of the obscenity" (361 U.S. at 161). See, the opinion of Justice Harlan in *Manual Enterprises, Inc. v. Day,* 370 U.S. 478, 492-493, and fn. 16. See also, *New York Times Co. v. Sullivan,* 376 U.S. 254,278-279.

to the questions upon which review was originally granted." *Redrup v. New York [Austin v. Kentucky]*, 386 U.S. 767, 770. In his dissent, Justice Harlan noted that in *Smith v. California*, a defendant criminally charged "with purveying obscene material must be shown to have had some kind of knowledge of the character of such material; the quality of that knowledge, however, was not defined," and Justice Harlan expressed regret the Court had not "come to grips with such issues" (386 U.S. at 771-772).

One is not ordinarily guilty of a crime unless he is aware of the existence of all those facts which make his conduct criminal. Ignorance or mistake of fact negatives the existence of *a mens rea.* Moreover, mere proof of knowledge will not be sufficient unless such knowledge is accompanied by an intent to do the acts which constitute the harm against which the law is directed. Both knowledge and intent must exist before *scienter* can be deemed proven. Knowledge is the foundation of intent; without the knowledge the intent cannot exist. *United States v. Falcone*, 311 U.S. 205. The ordinary criminal law also requires, in many cases, proof of a specific intent, that is, proof of an act done with a bad purpose. See, *Screws v. United States*, 325 U.S. 91; *Dennis v. United States*, 341 U.S. 494, 499.

Every obscenity prosecution implicates First Amendment questions, and therefore the standards for judging *Scienter* in such prosecutions require more critical analysis than exist in the ordinary criminal case. "When we deal with the complex of strands in the web of freedoms which make up free speech, the operation and effect of the method by which speech is sought to be restrained must be subjected to close analysis and critical judgment in the light of the particular

circumstances to which it is applied." *Speiser v. Randall,* 357 U.S. 513, 520. Stricter standards governing proof of *mens rea* and specific intent are required in the enforcement of statutes which affect the exercise of the freedoms of speech and press; this in order to avoid the constitutional infirmities which lurk in statutes involving First Amendment rights, and also to preserve the community's right to know which may be seriously affected by the chilling effect and self-induced censorship engendered by laws and prosecutions thereunder which fail to provide exacting standards for judging *scienter.*

As aforesaid, the court below held that mere proof of knowledge that the material was "sexually oriented" was sufficient to establish the requisite *scienter* in an obscenity prosecution. The Court declined to enunciate any other standard, disregarding decisions rendered by this Court which cast a far different light on the importance of maintaining the rights guaranteed by the First Amendment against subtle erosions created by vague and ambiguous statutes and the elimination of strict *scienter* requirements. Thus, the court below did not even require proof of an intent by an accused to commit a public wrong, or proof of knowledge of those operative facts which bring an obscenity statute into play, or proof of knowledge of the alleged obscene character of the material, or reckless disregard of whether or not the material was obscene. Yet such decisions of this Court as *Smith v. California,* 361 U.S. 147; *New York Times Co. v. Sullivan,* 376 U.S. 254, and the *Miller* quintet of decisions rendered on June 21, 1973, make it clear that mere proof of knowledge of the "sexual orientation" of an advertisement or film cannot be deemed to be equivalent of proof of guilty knowledge under the statute and the Constitution.

To permit the conviction of an accused in an obscenity prosecution solely on the basis of purported proof that the accused knew the "sexual nature" of a book, is to impose the absolute criminal liability condemned by this Court in *Smith v. California,*. Sex and obscenity are not synonymous, and knowledge of the "sexual orientation" of an advertisement or film dealing with sex plainly cannot be the equivalent of knowledge of the obscene character of the material. Mere proof that a publisher or distributor knew the sexual orientation of the multifold books, magazines and films ultimately held to be entitled to constitutional protection by this Court and other courts, plainly fails to establish that such publisher or distributor knew the alleged obscene character of the material. See, for example, *Grove Press, Inc. v. Gerstein,* 378 U.S. 577; *Weiner v. California,* 404 U.S. 988; *Burgin v. South Carolina,* 404 U.S. 806; *Hartstein v. Missouri,* 404 U.S. 988.

It follows, therefore, that mere proof of knowledge of "sexual nature" cannot be the standard for judging *scienter* since such standard alone would leave the federal obscenity statute vague, ambiguous, uncertain and overbroad, in violation of the provisions of the First Amendment. Prosecutions under such a standard would violate the due process guarantees which accompany any criminal trial. A jury or trial judge would be left free to presume guilty knowledge under the federal obscenity statute by their own subject predilections, on the basis of arbitrary and irrational inferences and presumptions which undermine all procedural safeguards required in criminal prosecutions, particularly involving speech and press. *Bailey v. Alabama,* 219 U.S. 219; *Tot v. United States,* 319 U.S. 463; *Speiser v. Randall,* 357 U.S. 513. Such an arbitrary standard would encourage the

self-censorship and private suppression of constitutional protected material. *Smith v. California,* 361 U.S. 147; *New York Times Co. v. Sullivan,* 376 U.S. 254.

If an accused may be convicted without any proof that he knew that the material was obscene in nature, and without any possibility of establishing in his own defense his honest ignorance that the material was obscene, then the trial of an obscenity prosecution becomes inherently unfair, and the right to confront witnesses, to present evidence in one's own behalf, and to have the assistance of counsel and a determination by an impartial jury becomes meaningless. Such a determination by a jury, based on its own subjective predilections, is no more than an *ex post facto* determination which visits upon the accused cruel and unusual punishment in the most primary sense of the terms. The notion that everyone "must take notice of what, in this enlightened age, is meant by decency, purity and chastity in social life, and what must be deemed obscene, lewd and lascivious" has been rendered untenable by the decisions of this Court since *Roth,* through *Jacobellis, Memoirs, Ginzburg, Redrup, Stanley,* and the June 21, decisions, as well as by the changing social conditions, attitudes, and "sexual revolution" (*Miller v. California,* 93 S.Ct. at 2621) of the past decades. See, *Griswold v. Connecticut,* 381 U.S. 479; *Eisenstadt v. Baird,* 405 U.S. 438; *Doe v. Bolton,* 93 S. Ct. 739; *Roe v. Walde,* 93 S.Ct. 705; *United States v. Klaw,* 350 F.2d 155 (2 Cir. 1965); *In re Winship,* 397 U.S. 358; *United States v. Vuitch,* 402 U.S. 62; and *The Report of the Commission on Obscenity and Pornography,* September 1970.

It is submitted, therefore, that the judgment of conviction herein is constitutionally infirm because the

standard for judging *scienter*, based solely on knowledge of "sexual orientation," does violence to the guarantees of the free speech and press and due process clauses of the First and Fifth Amendments.

C. In view of the foregoing, it is submitted that the proof in the case herein is palpably insufficient to establish the requisite *scienter* on the part of the Petitioners.

In the first place, as heretofore noted, there is no proof and there can be no claim made by the Government of any knowledge on the part of the Petitioners of the contents of the specific material involved in these proceedings, nor is there any proof that these Petitioners transported or caused to transport the specific materials named in the Indictments. The Government was required to prove beyond a reasonable doubt the elements of the charge contained in the Indictments. To convict an accused without any proof of the specific offense charged in an indictment is the sheerest deprivation of liberty without due process of law. *DeJonge v. Oregon*, 299 U.S. 353, 362; *Thompson v. Louisville*, 362 U.S. 199.

If it is sought to sustain Petitioner's conviction solely upon a claim that he generally knew the "contents" of material or generally knew that material was "sexually oriented," then even so the independent evidence is lacking in the record to sustain such a claim. There is not a scintilla of proof in the record that Petitioner directly or indirectly knew that the particular material involved in the Indictment herein substantially exceeded contemporary community standards in the Nation as a whole in the depiction of sex or nudity, appealed to the prurient interest of the average person

or the average person of any identifiable sexually deviant group, or that the particular material was utterly without social importance or value. See, *Luros v. United States*, 389 F.2d 200 (8 Cir. 1968).

It it is attempted to invoke the concept of "aiding and abetting" under 18 U.S.C. §2, the result, it is submitted, is no different. It is well established that the crime of aiding and abetting is one requiring "specific intent." Mere association, as opposed to participation, is not sufficient to establish guilt. Association must be accompanied by a culpable purpose before it can be equated with aiding and abetting. There is no evidence of such purpose here on the part of the Petitioner Case have emphasized that mere speculation is not permitted to substitute for proof in such cases. *See, Snyder v. United States*, 448 F.2d 716 (8 Cir. 1971); *United States v. Kelton*, 446 F.2d 669 (8 Cir. 1971); *United States v. Rodgers*, 319 F.2d 1315 (10 Cir. 1970); *United States v. Barber*, 429 F.2d 1394 (3 Cir. 1970); *Hernandez v. United States*, 300 F.2d 114, 123-124 (9 Cir. 1962).

Petitioner respectfully submits that the failure to prove the element of knowledge, even on the standard for judging knowledge adopted by the Court of Appeals, invalidates the judgment of conviction herein.

5. The conduct alleged in the Indictments herein occurred in 1969-1970. The trial was conducted and the verdict returned in December 1970. At the trial, the jury was

instructed to determine the customary limits of candor by the contemporary standards of the "national community", and to determine whether the challenged material appealed to the prurient interest of the average person in the community as a whole. Yet the Government offered no evidence by which the jury could determine the content of the "national" standards. Nor was any attempt made by the Government to prove that the material was utterly without redeeming social value or importance.

The contention made by Petitioner below that the Government had failed to adduce any competent evidence of the essential elements of the offenses charged in the Indictment, was dismissed by the court below.

The trial in the case herein was conducted under the theory that the standards for judging the alleged obscenity of the material were those enunciated by this Court in *Memoirs v. Massachusetts,* 383 U.S. 413,418. Thus the obligation rested upon the prosecution to prove beyond a reasonable doubt three essential elements of the offense, to wit, that (a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; (c) the material is utterly without redeeming social value.

As this Court noted in *Miller* (93 S.Ct. at 2618-2620) a national standard of First Amendment protection limited both federal and state prosecutions under controlling case law at the time when the trial herein was conducted. In the area of federal prosecutions, it was recognized that the plain intent of Congress in the enactment of federal obscenity statutes was the requirement that the alleged obscenity of publications be measured by a national standard. This was the view of Justice Harlan from *Roth* through *Manual Enterprises, Inc. v. Day*, 370 U.S. 478, 488, n. 10, and *Memoirs*, 383 U.S. at 458. In *Miller*, the Chief Justice, writing for the majority, noted the past opinions of Justice Harlan and the concurring views of Justice Blackman on this issue. Moreover, under *Memoirs*, the prosecution, in order to prove obscenity, was required to affirmatively establish that the material was "utterly without redeeming social value." *Miller v. California*, 93 S.Ct. at 2613.

As heretofore stated, the Government made no attempt to prove the aforesaid essential elements of the offense. See, *In re Winship*, 397 U.S. 358; and *Memoirs v. Massachusetts*, 383 U.S. 413. Nevertheless, the Petitioner here was convicted on the theory that the essential elements of the offense were those enunciated in *Memoirs*. This Court, however, described the *Memoirs* national standard test as "unrealistic" and "an exercise in futility". The national standard was termed "hypothetical" and "unascertainable"; a standard which was not "provable," and "neither realistic nor constitutionally sound." 93 S.Ct. at 2618-2620. With respect to the "utterly without redeeming social value" test, this Court described the test as imposing a "burden virtually impossible to discharge under our criminal standards of proof." 93 S.Ct. at 2613.

In short, the Petitioner here was convicted without proof of the essential elements of the offense and under

standards which this Court has held are unconstitutional and virtually impossible to establish. To convict an accused without proof of guilt and under palpably unconstitutional and unlawful standards is to deprive the accused arbitrarily and capriciously of his liberty without the slightest semblance of due process of law. *Thompson v. City of Louisville,* 362 U.S. 199; *Tot v. United States,* 319 U.S. 463; *DeJonge v. Oregon,* 299 U.S. 353; *Cole v. Arkansas,* 333 U.S. 196; *Rabe v. Washington,* 405 U.S. 313; *In re Winship,* 397 U.S. 358.

6. The publications herein were entitled to constitutional protection when the alleged offenses occurred and at the time the judgments of conviction were rendered. The materials were entitled to constitutional protection under the prior decisions of this Court and indeed, the decisions of this Court rendered on June 21, 1973 support this conclusion. The materials herein do not substantially exceed the candor of those held entitled to constitutional protection in such cases as *Wiener v. California,* 404 U.S. 988; *Burgin v. South Carolina,* 404 U.S. 806; and *California v. Pinkus,* 400 U.S. 922. *Hoyt v. Minnesota,* ___U.S. ___ .

As heretofore discussed, if under the *Memoirs* standards, "this Court was compelled to embark on the practice of summarily reversing convictions for the dissemination of materials that at least five members of the Court, applying their separate tests, found to be protected by the First Amendment" (93 S.Ct. at 2614, n.3), then it is respectfully submitted the Petitioner could not be fairly charged with knowing that the materials herein were without constitutional protection in the light of the multifold rulings made by the Court with respect to comparable material.

7. The court below concluded that the publications herein offended both the *Memoirs* and *Miller* standards (June 21,1973), and adjudged that the convictions could be upheld. Such ruling offends not only the free speech and press and due process guarantees of the Constitution, but the principles of fair notice and protection of an accused from retroactive application of unforeseeable judicial statutory construction.

Insofar as the *Memoirs* standards are concerned, as hereinbefore discussed, none of the materials are obscene in the light of the record herein.

Insofar as the *Miller* standards are concerned, Petitioner's conviction has been affirmed under a statute with a meaning quite different from the one he was charged with violating. The statute as construed is impermissibly vague as applied to Petitioner because of its failure to provide fair notice that criminal liability was dependent upon the unknown specified sexual conduct, or upon some standards other than national, or upon a standard other than "utterly without redeeming social value." *Rabe v. Washington,* 405 U.S. 313. The Petitioner was charged and tried solely under the *Memoirs* standards. It has been repeatedly held by this Court that conviction upon a charge not made, or upon a theory not tried, is a sheer denial of due process of law. *DeJonge v. Oregon,* 299 U.S. 353; *Cole v. Arkansas,* 333 U.S. 196.

Furthermore, the court below manifestly read into the law conduct not previously proscribed and which, in addition, altered the legal rules of evidence, permitting less and different testimony than the law required at the time of the

commission of the alleged offense. See *Bouie v. Columbia,* 378 U.S. 347. This Court recently stated, in *Douglas v. Buder,* 93 S.Ct. 2199, 2200-2201:

> "... We held in Bouie that '[w]hen ... [an] unforeseeable state-court construction of a criminal statute is applied retroactively to subject a person to criminal liability for past conduct, the effect is to deprive him of due process of law in the sense of fair warning that his contemplated conduct constitutes a crime."

The action of the court below is tantamount to an amendment of the Indictments herein, contrary to constitutional commands. The Indictments so amended would no longer be the accusation made by the Grand Jury which returned them. *Ex parte Bain,* 121 U.S. 1, 10, 13.[3]

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[3] As noted earlier, the Court granted certiorari in *Hamling v. United States,* October Term 1973, No. 73-507, in which the questions presented were virtually identical to those presented herein. *Hamling* was argued on April 15, 1974.

Conclusion

For the foregoing reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Court of Appeals for the Fifth Circuit.

Respectfully submitted

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APPENDIX A

UNITED STATES of America, Plaintiff-Appellee,
v.
William GRONER, d/b/a Lucky Distributors, Defendant-Appellant.

No. 71-1091
Summary Calendar.*

United States Court of Appeals,
Fifth Circuit.

May 24, 1974.

Defendant was convicted before the United States District Court for the Northern District of Texas, Joe Ewing Estes, J., of knowingly using a common carrier in interstate commerce to transport a quantity of obscene books and he appealed. A panel of the United States Court of Appeals, Fifth Circuit, 475 F.2d 550, reversed. Thereafter, the Court of Appeals, sitting en banc, 479 F.2d 577, affirmed conviction and petition for certiorari was filed. The United States Supreme Court, 94 S.Ct. 278, 38 L.Ed.2d 213, vacated judgment and remanded case. On remand, the Court of Appeals, Thornberry, Circuit Judge, held that books were obscene under both "Miller" standard and "Roth-Memoirs" standard; that statute under which defendant was convicted was not unconstitutionally vague or overbroad in view of authoritative judicial construction; that it was not necessary for government to prove that defendant had been aware that materials were legally obscene but only that defendant had knowledge of

*Rule 18, 5 Cir.; Isbell Enterprises, Inc. v. Citizens Casualty Company of New York et al., 5 Cir. 1970, 431 F.2d 409, Part I.

nature of the materials placed in interstate commerce; and that defendant had no standing to contest search and seizure of box which had been left at airline freight terminal.

Affirmed.

1. Obscenity 5

Proper procedure for determining whether "pre-Miller" material is obscene is to test material under both the prior "Roth-Memoirs" standard and "Miller" standard and unless material is judged to be obscene under both old and new standards, defendant cannot be convicted of an obscenity offense based upon the material.

2. Obscenity 5

Books upon which was based defendant's conviction of knowingly using common carrier in interstate commerce to transport quantity of obscene books were obscene under both "Miller" standard and "Roth-Memoirs" standard. 18 U.S.C.A. § 1462.

3. Criminal Law 13.1(13)

Statute prohibiting the knowing use of a common carrier in interstate commerce to transport obscene material was not unconstitutionally vague and overbroad in view of authoritative judicial construction given the statute. 18 U.S.C.A. § 1462.

4. Obscenity 15

In prosecution for knowingly using common carrier in interstate commerce to transport obscene material, to meet its burden of proving scienter, government was only required to prove that defendant knew nature of materials he put in interstate commerce; it was not necessary for government to

prove that defendant had been aware that materials were legally obscene. 18 U.S.C.A. § 1462.

5. Searches and Seizures 7(26)

Defendant had no standing to contest search and seizure of box left at airline freight terminal where he was not on premises at time of contested search and seizure, had no proprietary or possessory interest in premises where search and seizure took place and was not charged with an offense that included, as an essential element of the offense charged, possession of seized evidence at time of contested search and seizure.

Appeal from the United States District Court for the Northern District of Texas.

Before THORNBERRY, MORGAN and CLARK, Circuit Judges.

THORNBERRY, Circuit Judge:

For the third time,[1] William Groner's convictions on two counts of knowingly using a common carrier in interstate commerce to transport a quantity of obscene books, in violation of 18 U.S.C. §1462, are before this court. The case is before us pursuant to an order of the Supreme Court vacating our en banc judgment and remanding the cause for further consideration in light of Miller v. California, 1973, 413 U.S. 15, 93 S. Ct. 2607, 37 L.Ed. 2d 419; Paris Adult Theatre I v. Slaton, 1973, 413 U.S. 49, 93 S.Ct. 2628, 37 L.Ed.2d 446; Kaplan v. California, 1973, 413 U.S. 115, 93

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[1] For the history and background of the case, see the panel opinion reported at 475 F.2d 550, and the en banc opinion reported at 479 F.2d 577.

S.Ct. 2680, 37 L.Ed.2d 492; United States v. 12 200-ft. Reels of Super 8 mm. Film, 1973, 413 U.S. 123, 93 S.Ct. 2665, 37 L.Ed.2d 500; United States v. Orito, 1973, 413 U.S. 139, 93 S.Ct. 2674, 37 L.Ed.2d 513; Heller v. New York, 1973, 413 U.S. 483, 93 S.Ct. 2789, 37 L.Ed.2d 745; Roaden v. Kentucky, 1973, 413 U.S. 496, 93 S.Ct. 2796, 37 L.Ed.2d 757; and Alexander v. Virginia, 1973, 413 U.S. 836, 93 S.Ct. 2803, 37 L.Ed.2d 993, all decided June 25, 1973.

Groner now contends (1) that the convictions cannot stand because the *Roth-Memoirs* test is now constitutionally inapplicable and because the *Miller* test cannot be constitutionally applied retroactively, (2) that in any case the evidence was insufficient to support the jury's conclusion that the books were obscene, (3) that 18 U.S.C. § 1462 does not define proscribed conduct with sufficient particularity to satisfy *Miller* and is thus unconstitutionally vague and overbroad, (4) that under 18 U.S.C. §1462 it is constitutionally necessary for the government to prove not merely that the defendant had knowledge of the nature of the materials placed in interstate commerce, but also that he was aware that the materials were legally obscene, and (5) that the F.B.I.'s acquisition and retnention of the books constituted an unconstitutional search and seizure in light of Roaden v. Kentucky, supra.

[1,2] We rejected Groner's first contention in United States v. Thevis, 5th Cir. 1973, 484 F.2d 1149. As that case demands, the proper review procedure for determining whether pre-*Miller* material is obscene is to test the material under both the *Roth-Memoirs* standard and the *Miller* standard. This procedure avoids an ex post facto application of *Miller* and keeps the old standard intact for the purpose of judging offenses committed prior to the Supreme Court decision in *Miller*. Unless the material is judged to be obscene under both the old and the new standards, there can be no conviction. United States v. Millican, 5th Cir. 1973, 487 F.2d 331. We need not remand for a new trial because it is our

duty to make an "independent constitutional judgment on the facts of the case as to whether the material is constitutionally protected." Jacobellis v. Ohio, 1964, 378 U.S. 184, 190, 84 S.Ct. 1676, 1679, 12 L.Ed.2d 793. Having done so, we reject appellant's second contention and conclude that under each of the two tests the books are indeed obscene. *See* United States v. Cote, *5th Cir. 1973, 485 F.2d 574*; United States v. New Orleans Book Mart, Inc., 5th Cir. 1974, 490 F.2d 73; United States v. Sulaiman, 5th Cir. 1974, 490 F.2d 78; United States v. Thevis, 5th Cir. 1974, 490 F.2d 76.

[3,4] We have also recently rejected appellant's third contention by concluding that 18 U.S.C. § 1462 has been the subject of authoritative judicial construction which renders its application constitutionally proper. United States v. Thevis, supra, 490 F.2d 76; *see also* United States v. Orito, supra. In similar fashion, we have foreclosed appellant's fourth contention with our holding that the government has met its burden of proving scienter under this statute if it proves that the appellant knew the nature of the materials he put in interstate commerce. United States v. Thevis, supra, 484 F.2d 1149.

[5] Appellant's final contention can be disposed of summarily. The record shows that at the American Airlines Freight Terminal a security employee discovered that the box containing the books had somehow been opened and pilfered. American Airlines contacted the F.B.I. and placed the pilfered carton in their hands for investigation of an apparent theft. A subsequent search of the carton convinced the F.B.I. that the material was "contraband," and the agency thus retained the materials until the time of trial when, for the first time, the appellant questioned the propriety of the F.B.I.'s actions. We expressly do not reach the merits of Groner's contention that the F.B.I.'s conduct was violative of the principles enunciated in Roaden v. Kentucky, supra, because the Appellant lacks

standing to challenge the action. There is no standing to contest a search and seizure where, as here, the defendant was not on the premises at the time of the contested search and seizure; had no proprietary or possessory interest in the premises; and was not charged with an offense that includes, as an essential element of the offense charged, possession of the seized evidence at the time of the contested search and seizure. Brown v. United States, 1973, 411 U.S. 223, 229, 93 S.Ct. 1565, 1569, 36 L.Ed.2d 208.

Affirmed.

APPENDIX B

Constitutional and Statutory Provisions.

1. The pertinent provisions of the First Amendment are:

"Congress shall make no law . . . abridging the freedom of speech, or of the press . . . "

2. The pertinent provisions of the Fifth Amendment are:

"No person shall . . . be deprived of life, liberty, or property, without due process of law . . . "

3. The pertinent provisions of the Sixth Amendment are:

"In all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation . . . "

4. The provisions of the Eighth Amendment are:

"Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

5. The pertinent provisions of Article I, §9 are:

"*** No . . . ex post facto Law shall be passed.***"

6. The pertinent provisions of 18 U.S.C. §1462 are:

"Whoever brings into the United States, or any place subject to the jurisdiction thereof, or knowingly uses any express company or other common carrier, for carriage in interstate or foreign commerce–

(a) an obscene, lewd, lascivious, or filthy book, pamphlet, picture, motion-picture film, paper, letter, writing, print, or other matter of indecent character; or***

"Whoever knowingly takes from such express company or other common carrier any matter or thing the carriage of which is herein made unlawful–

"Shall be fined not more than $5,000 or imprisoned not more than five years, or both, for the first such offense and shall be fined not more than $10,000 or imprisoned not more than ten years or both, for each such offense thereafter." (June 25, 1948, c. 645, 62 Stat. 768; May 27, 1950, c. 214, §1, 64 Stat. 194; Aug. 28, 1958, Pub.L. 85-796, §2, 72 Stat. 962.)

OCTOBER TERM, 1974

NO. 73-1972

WILLIAM GRONER,
d/b/a/ LUCKY DISTRIBUTORS,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

SUPPLEMENT TO PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE FIFTH CIRCUIT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

NO. 73-1932

WILLIAM GRONER,
d/b/a/ LUCKY DISTRIBUTORS,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

SUPPLEMENT TO PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE FIFTH CIRCUIT

REASONS FOR FILING A SUPPLEMENT

The Petitioner respectfully files this Supplement to the Petition for Writ of Certiorari in No. 73-1932, docketed in this Court on June 24, 1974, pursuant to *Rule 24 (5)* of this Court. Petitioner states that this Supplement is within the

clear purpose of *Rule 24 (5)* in that it calls "attention to new cases or legislation or other intervening matter not available at the time of his last filing." The new matters specifically referred to herein are this Court's decision in *Hamling v. United States*, ____ U.S. ____, 41 L.Ed.2d 590, decided the same day this Petition was docketed, and this Court's grant of certiorari, vacation and remand in *Trinkler v. Alabama*, No. 73-844, decided July 25, 1974.

SUPPLEMENTAL REASONS FOR GRANTING THE WRIT

1. After this case was decided on remand, *United States v. Groner*, 494 F.2d 499 (5th Circ. 1974) (see Appendix A to the Petition), and on the same day that a Petition for Writ of Certiorari was filed in this case, this Court decided *Hamling v. United States*, ____ U.S. ____, 41 L.Ed.2d 590. In *Hamling*, one of the issues this Court addressed itself to was the use of national community standards in the trial court's instructions to the jury. In rejecting the Petitioner's claims that the use of national standards prejudiced them because of this Court's holding in *Miller v. California*, 413 U.S. 15, Mr. Justice Rehnquist said that:

> . . . there is no doubt that its *occasional references* to the community standards of the "country as a whole" delineated a wider geographical area than would be warranted by *Miller*, *12 200-ft. Reels of Film*, and our construction of section 1461 herein, *ante*, at ____. Whether petitioners were materially prejudiced by those references is a different question. Certainly the giving of such an instruction does not render their convictions void as a matter of constitutional law. This Court has emphasized on more than one occasion that a principal concern in requiring that a judgment be made on the basis of

> "contemporary community standards" is to assure that the material is judged neither on the basis of each juror's personal opinion, or by its effect on a particularly sensitive or insensitive person or group. *Miller v. California, supra,* 413 U.S. at 33; *Mishkin v. New York,* 383 U.S. 502, 508-509 (1966); *Roth v. United States,* 354 U.S. 476, 489 (1957). The District Court's instructions in this case, *including its* reference to the standards of the "country as a whole," undoubtedly accomplished this purpose.

—— U.S. ——, 41 L.Ed.2d at 614-15 (emphasis supplied).

It is thus clear that *Hamling* is not "on all fours" with the facts presented herein. In the trial court below, the instructions centered solely on national standards, whereas the jury instructions in *Hamling* contained mixed references to both local and national community standards. The Court of Appeals for the Fifth Circuit claimed to give the Petitioner the benefit of both the *Roth-Memoirs* standards and the *Miller* standards, 494 F.2d at 501, but gave no support for such a claim. The trial of Petitioner proceeded on a theory of national standards, and the Petitioner was not charged with violating the local standards of Dallas, Texas. Indeed, he was not given an opportunity to present evidence and a defense regarding such standards. There was thus no evidence adduced at trial and present in the record for the Court of Appeals to make a determination that local community standards had been contravened and upon which it could assert that the Petitioner was being given the "benefit" of *Miller.*

A comparison of the "occasional references" in *Hamling* with the homogeneous instructions herein is a comparison of apples and oranges. There were no occasional references here, but references *solely* to national standards. Mr. Justice

Rehnquist in announcing this Court's decision in *Hamling* stated:

> A juror is entitled to draw on his *own* knowledge of the views of the average person *in the community or vicinage from which he comes* for making the required determination, just as he is entitled to draw on his knowledge of the propensities of a 'reasonable' person in other areas of the law. *Stone v. New York, Chicago & St. Louis R. Co.*, 344 U.S. 407, 409 (1953); *Schultz v. Pennsylvania R. Co.*, 350 U.S. 573, 525-526 (1956).
>
> * * * * *
>
> The result of the *Miller* cases, ... as a matter of constitutional law and federal statutory construction, is to permit a juror sitting in obscenity cases to draw on knowledge *of the community or vicinage from which he comes* in deciding what conclusion "the average person applying contemporary community standards" would reach in a given case.

____ U.S. ____, 41 L.Ed.2d at 613.

As this Court approved in *Miller* Mr. Chief Justice Warren's dissent in *Jacobellis v. Ohio*, 378 U.S. 184, 199, that community standards did not equate with national standards, and as local community standards were first definitively enunciated by this Court in *Hamling*, then the judgment below cannot stand because the Petitioner was deprived of due process of law because of conviction of a charge not made and on one theory not tried: local standards.

As stated above, Mr. Justice Rehnquist dismissed the "national standards" argument of the petitioner in *Hamling* because the jury instructions contained only non-prejudicial "references" to the "country as a whole".

> . . . we hold that reversal is required only where there is a probability that the excision of the references to the "country as a whole" in the instruction would have materially affected the deliberations of the jury. Cf. *Namet v. United States*, 373 U.S. 179, 190-191 (1963); *Lopez v. United States*, 373 U.S. 427, 436 (1963). Our examination of the record convinces us that such a probability does not exist in this case. ____ U.S. ____, 41 L.Ed.2d at 615. If references to national standards are excised from this case, then there remains nothing on which a jury may base a conviction, and, therefore, *Hamling* requires reversal of the conviction herein.

2. The Court of Appeals below decided that the *scienter* requirement for conviction of the Petitioner had been met. *United States v. Groner*, 494 F.2d 499, 501; see Petition, p. 22. Relying on its opinion in *United States v. Thevis*, 484 F.2d 1149, the Court of Appeals said that "the government has met its burden of proving scienter under this statute if it proves that the appellant knew the nature of the materials he put in interstate commerce." 494 F.2d at 501. This simple showing of *scienter* is, however, woefully inadequate.

As the Petitioner's Petition for a Writ of Certiorari stated, pp. 22-30, more than a general knowledge of the nature of the materials is required to show the requisite scienter. Also, the Petition pointed out that there was no competent evidence adduced at trial to support even this standard of the Court of Appeals. The Petitioner, apparently, has been borne out in his argument by this Court's decision in *Hamling*, *supra*.

Mr. Justice Rehnquist, writing of the *scienter* requirement for obscenity convictions under federal law, said:

> "It is constitutionally sufficient that the prosecution show that a defendant had knowledge of the contents of the materials he distributes, and that he knew the character and nature of the materials." _____ U.S. _____ 41 L. Ed. 2d at 624.

It is clear from a reading of the record in this case that there wasn't a scintilla of evidence that the Petitioner had knowledge of the contents of the materials he distributed, nor that he knew either the character or the nature of the materials. Chief Justice Burger, writing for the majority of this Court in *Miller v. California,* 413 U.S. 15, said that:

> "... no one will be subject to prosecution for the sale of obscene materials unless these materials depict or describe patently offensive 'hard core' sexual conduct ...
>
> * * *
>
> "... a majority of this Court has agreed to isolate 'hard core' pornography from expression protected by the First Amendment."

413 U.S. at 27, 29. Yet the Court of Appeals would deem that a general knowledge of the Petitioner that the material was sexual in orientation is a sufficient showing of *scienter!*

This Court has said that sex and obscenity are not synonymous. *Roth v. United States,* 354 U.S. 476. See *Miller v. California,* 413 U.S. 15. This being the case, then to hold that the Petitioner had the requisite *scienter* because he might

have known of the materials' sexual orientation violates both the precepts of *Roth* and *Miller* on the one hand, and the tri-partite *scienter* test enunciated in *Hamling*. It is clear that not even one portion of the *Hamling* test has been met, there being no proof adduced at trial. With no showing of *scienter*, then a conviction cannot be had; or if it be had, then it would violate the holding of this Court in *Smith v. California*, 361 U.S. 147, condemning absolute criminal liability in obscenity cases. The only way whereby one might then avoid prosecution would be by engaging in self-censorship, a device scorned by this Court. *Carroll v. Comm'rs. of Princess Anne*, 393 U.S. 175; *Freedman v. Maryland*, 380 U.S. 51; *Kingsley Books, Inc. v. Brown*, 354 U.S. 436. See *Dombrowski v. Pfister*, 380 U.S. 479; *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58; *Shelton v. Tucker*, 364 U.S. 479; *Speiser v. Randall*, 357 U.S. 513.

As the conviction herein was had without any showing of *scienter* as required and enunciated in *Hamling, supra*, then it must be reversed.

3. Since the filing of the Petition in this case on June 24, 1974, this Court granted certiorari in *Trinkler v. Alabama*, No. 73-844, July 25, 1974. *Trinkler* was vacated and remanded to the Court of Criminal Appeals of Alabama for reconsideration in light of this Court's decisions in *Hamling v. United States*, ____ U.S. ____ 41 L. Ed. 2d. 590, and *Jenkins v. Georgia*, ____ U.S. ____ 41 L. Ed. 2d. 642.

Hamling reaffirmed this Court's position in *Miller v. California*, 413 U.S. 15, 27 that only "hard core" pornography is to be proscribed. ____ U.S. ____ , 41 L. Ed.2d at 618-19.

Mr. Justice Rehnquist said that:

> Miller, in describing the type of material which might be constitutionally proscribed, 413 U.S., at 25, was speaking in terms of substantive constitutional law of the First and Fourteenth Amendments. See *Jenkins v. Georgia, post,* p. ____. While the particular descriptions there contained were not intended to be exhaustive, they clearly indicate that there is a limit beyond which neither legislative draftsmen nor juries may go in concluding that particular material is "patently offensive" within the meaning of the obscenity test set forth in the *Miller* cases.

____ U.S. ____, 41 L.Ed. 2d at 619. And in *Jenkins*, Mr. Justice Rehnquist stated for this Court that:

> Even though questions of appeal to the "prurient interest" or of patent offensiveness are "essentially questions of fact," it would be a serious misreading of *Miller* to conclude that juries have unbridled discretion in determining what is "patently offensive." Not only did we there say that "the First Amendment values applicable to the States through the Fourteenth Amendment are adequately protected by the ultimate power of appellate courts to conduct an independent review of constitutional claims when necessary," 413 U.S., at 25, but we made it plain that under that holding "no one will be subject to prosecution for the sale or exposure of obscene materials unless these materials depict or describe patently offensive 'hard core' sexual conduct . . ." 413 U.S., at 27.
>
> We also took pains in *Miller* to "give a few plain examples of what a state statute could define for regulation under part (b) of the standard announced,"

> that is, the requirement of patent offensiveness. 413 U.S., at 25. These examples included "representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated," and "representations or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals." *Ibid.*, While this did not purport to be an exhaustive catalog of what juries might find patently offensive, it was certainly intended to fix substantive constitutional limitations, deriving from the First Amendment, on the type of material subject to such a determination.

_____ U.S., ____, 41 L. Ed. 2d at 650.

It is thus quite clear that this Court will exercise an independent judicial review of material to assure that only "hard core" material is proscribed. See *J-R Distributors, Inc. v. Washington*, No. 73-937, cert. denied, July 25, 1974. (Opinion of White, J.)

In *Miller, supra*, Chief Justice Burger wrote of this Court's duty to exercise supervision of the constitutional problem of obscenity, quoting, 413 U.S. at 29-30, from *Jacobellis* that "our duty admits of no 'substitute for facing up to the tough individual problems of constitutional judgment involved in every obscenity case.' [Roth v. United States, *supra*, at 498, 1 L.Ed. 2d 1498]; see *Manual Enterprises, Inc. v. Day*, 370 U.S. 478, 488, [8 L. Ed. 2d 639, 82 S. Ct. 1432] (opinion of Harlan, J.) [footnote omitted]." *Jacobellis v. Ohio*, supra, at 188, 12 L.Ed. 2d 793 (opinion of Brennan, J.).

Thus, this Court has reaffirmed its position to make the independent judicial review of obscenity to ascertain that publications not within the ambit of obscenity defined in

Miller will be given the *First Amendment* protection they are entitled to. In *Hamling*, this Court said, "It is plain from the Court of Appeals' description of the brochure involved here that it is a form of hard-core pornography well within the types of permissibly proscribed depictions described in *Miller* . . . " ____ U.S. ____ 41 L. Ed. 2d at ____. And in *Jenkins*, this Court said that "Our *own view* of the film satisfies us that 'Carnal Knowledge' could not be found under the *Miller* standards to depict sexual conduct in a patently offensive way." ____ U.S. ____, 41 L. Ed. 2d at ____.

A review of the materials alleged herein to be obscene will clearly illustrate that they are not such materials as to be deserving of the label "hard core" and are within the substantive protection of the *First Amendment* as enunciated in *Miller*. Indeed, the materials herein are far less offensive than those upon which a vacation and remand was granted in *Trinkler, supra.*

The material found to be obscene and "hard core" in *Hamling* was described by the Court of Appeals in that case as follows:

> "The folder opens to a full page splash of pictures portraying heterosexual and homosexual intercourse, sodomy and a variety of deviate sexual acts. Specifically, a group picture of nine persons, one male engaged in masturbation, a female masturbating two males, two couples engaged in intercourse in reverse fashion while one female participant engages in fellatio of a male; a second group picture of six persons, two males masturbating, two fellatrices practicing the act, each bearing a clear depiction of ejaculated seminal fluid on their faces; two persons with the female engaged in the act of fellatio and the

> male in female masturbation by hand; two separate pictures of males engaged in cunnilinction; a film strip of six frames depicting lesbian love scenes including a cunnilinguist in action and female masturbation with another's hand and a vibrator, and two frames, one depicting a woman mouthing the penis of a horse, and a second poising the same for entrance into her vagina." 481 F.2d, at 316-317.

_____ U.S. _____ 41 L. Ed. 2d at _____.

In joining the denial of certioari in *Sians v. United States*, No. 73-584, Mr. Justice White described the materials as:

> An unremitting series of explicit photographs of a wide spectrum of sexual conduct, including homosexual acts, anal intercourse, fellatio, cunnilingus and group orgies, . . . held obscene under any standard by the Court of Appeals. I would not review that judgment.

J-R Distributors, Inc. v. Washington, No. 73-937, Slip. Op. p. 3 (opinion of White, J.). And in the case of *J-R Distributors, Inc.*, itself, Justice White said:

> As for the materials on file, it is sufficiently clear to me that they fall within the category of hardcore pornography unprotected by the First Amendment that plenary review is not required. One of the publications involved is "Sex Between Humans and Animals." Mr. Justice Brennan would apparently hold that the First Amendment prohibits government from denying consenting adults access to such material, but I do not construe the First Amendment as preventing the States from prohibiting the distribution of a publication whose dominant theme is represented by repeated photographs of men and women performing sex acts with a variety of animals.

Slip. Op. p. 3 (opinion of White, J.)

The books upon which Petitioner stands convicted come nowhere near the "hard core" material described above. The books by any standard are relatively innocuous. They are even less offensive than the materials in *Trinkler, supra.* Petitioner's conviction, then, is based upon a finding of obscenity wholly at odds with the clear import of this Court's decisions in *Miller, Hamling* and *Jenkins,* and clearly contravenes the *First Amendment.* "*Miller,* in describing the type of material which might be constitutionally proscribed, 413 U.S., at 25, was speaking in terms of substantive constitutional law of the First and Fourteenth Amendments." *Hamling, supra,* 41 L. Ed. 2d at ____.

Thus, Petitioner has been convicted and has been imprisoned for the distribution of material that is entitled to the substantive protection of the *First Amendment.*

CONCLUSION

For the foregoing reasons, and the reasons set forth in the Petition, a Writ of Certiorari should issue to review the judgment and opinion of the Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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